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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 291

ARCHIE J. MCLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN MCLAREN, DECEASED, *Petitioner,*

vs.

L. G. FLEISCHER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

AND

BRIEF IN SUPPORT THEREOF.

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Archie J. McLaren, administrator, respectfully petitions this Honorable Court to require that the proceedings in a decree of the Supreme Court of the State of California in the case of Archie McLaren, substituted for John McLaren, plaintiff and appellant, vs. L. G. Fleischer, defendant and respondent, L. A. No. 4736, in

said court on appeal from the Superior Court of Riverside County, be certified to this Honorable Court for review and determination, with the same power and authority and with like affect as if brought to this Honorable Court by appeal or writ of error pursuant to law.

This action was brought by the petitioner's decedent against the respondent to procure a decree in equity declaring respondent to hold the title to a certain quarter section of land in trust for John McLaren by reason of the latter's settlement made and homestead application tendered prior to the homestead application of the respondent. Relief was denied by the Superior Court of Riverside County, and on appeal to the Supreme Court of California the judgment was sustained upon the ground that respondent had acquired a contestant's preference right of entry while the land was withdrawn under the reclamation act, that such right remained suspended during the withdrawal, preventing the acquisition of any settlement rights, and that it continued in force during a period of thirty days after the reclamation withdrawal was finally revoked.

After the case reached the Supreme Court of California the plaintiff and appellant died, whereupon your petitioner duly qualified as administrator of his estate and was substituted as party plaintiff.

Under Section 237 of the Judicial Code (36 Stat., 1156), as amended September 6, 1916 (39 Stat., 726), and as construed by this Court in Ireland vs. Woods (246 U. S., 323), a writ of error does not lie in this case and the judgment below is reviewable only by *certiorari*.

This petition for writ of *certiorari* is based on the following grounds:

I.

That the opinion of the highest court of the State of California in this cause, holding that the respondent could and

did secure a preference right to the land in controversy, under the Act of May 14, 1880 (21 Stat., 141), which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards vs. Bodkin (249 Fed. Rep., 562, 568). The latter case involved land in the near vicinity of that here in controversy, and hence this Honorable Court should take action to bring about a uniformity of decisions.

II.

That under the express provisions of the said act of May 14, 1880, a contestant's preference right must be exercised within thirty days after the notice of the cancellation of the entry contested, and there is no authority in the Secretary of the Interior, either under the Reclamation Act of June 17, 1902 (32 Stat., 388), or otherwise, to extend this time to thirty days after the land shall have been restored from the reclamation withdrawal under which it was at the time of the contest or at the time of the cancellation.

III.

That the allowance of the preference right aforesaid is also contrary to the Interior Department's Regulations of January 19, 1909 (37 Land Decisions, 365), providing that "no contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest."

IV.

That the petitioner's decedent was an actual settler in good faith upon the tract of land here involved in reliance upon the aforesaid Regulations of the Secretary of the Interior, and his rights should, therefore, be protected; whereas, the respondent was a later settler and a later applicant for the land, who relied entirely upon the alleged preference right aforementioned.

Attention is also called to the fact that there were no printed copies of the State court's decision available for insertion in the certified copy of the transcript of the record, and hence copy of said decision is printed as an exhibit hereto.

Wherefore, your petitioner respectfully requests this Honorable Court to grant the prayer of this petition as set forth in the first paragraph hereof, and that your petitioner may be allowed and receive such other orders as he may be entitled to, and that such decision of the Supreme Court of the State of California may be reviewed and reversed by this Honorable Court.

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. ———.

ARCHIE MCLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN MCLAREN, DECEASED, *Petitioner*,

vs.

L. G. FLEISCHER, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The facts of this case may be briefly summarized as follows:

In February, 1908, the respondent, L. G. Fleischer, filed a contest against the homestead entry of one Charles W. Rider covering the SE¼ of Section 12, T. 7 S., R. 22 E., S. B. M., California, while said land was withdrawn under the first form of the reclamation act of 1902, which contest was finally decided and the Rider entry canceled on January 28, 1909. Thereafter and on February 11, 1909, the Register and Receiver notified respondent of the cancellation of the said entry.

Prior thereto, and on January 19, 1909 (37 Land Decisions, 365), the Interior Department issued general instructions, providing as follows:

> "No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest."

On January 10, 1910, the Secretary of the Interior restored said tract with other lands to public settlement on April 18, 1910, and to public entry on May 18, 1910, and on the date first mentioned, to wit, April 18th, John McLaren, with due qualifications under the homestead laws, made actual settlement on the land, established his residence and remained thereon until ejected therefrom under judicial procedure on April 24, 1915. He also filed homestead application on May 18, 1910, the date the land was first opened to entry, and continuously asserted same before the Land Department, exhausting all remedies there.

On May 18, 1910, subsequent to McLaren's application, respondent filed a homestead application without asserting any settlement but relying wholly on his alleged preference right, which application was allowed by the Land Department and patent issued to him in January, 1915, after repeated decisions by the Interior Department in his favor and against John McLaren. Promptly thereafter the latter commenced action in the local courts to have a trust impressed on the land in his favor, and a final decision against the administrator of his estate has been rendered by the Supreme Court of the State of California.

I.

This is one of a large number of companion cases involving lands withdrawn under the first form of a reclamation withdrawal, then contested and later restored to settlement and entry. Several of the cases have been decided by the State courts in favor of those holding the preference rights, and only one, namely, that of Edwards vs. Bodkin (249 Fed. Rep., 562), has been decided by the Federal Courts. The decision of that court is exactly the reverse of the opinion of the State courts in the instant case and other cases, and, accordingly, this Honorable Court should now take jurisdiction in order to harmonize these differences.

The State court in the present case holds that Edwards vs. Bodkin was determined upon a mistake of the General Land Office in declaring that the settler had abandoned his homestead claim. But while this was considered first in the decision of Judge Morrow, yet the court went still further and declared in unmistakable language that the act of May 14, 1880, only allows a preference right for thirty days after the Register issues notice of the cancellation of the land contested, and that the reclamation act of 1902 does not give any authority to the Secretary of the Interior to extend the limitation of the act of May 14, 1880; hence that the Regulations of June 6, 1905 (33 Land Decisions, 607), assuming to extend them, were issued without authority, of law; and, finally, that even though there was an authority for the said Regulations of 1905 they were vacated by the Regulations of January 19, 1909, prior to the cancellation of the entry there involved and the attempted award of a preference right thereon. As Judge Morrow cogently observes:

> "If we hold that the Secretary of the Interior had the authority to make the Regulations of June 6, 1905, we must also hold that he had the authority to make the Regulations of January 19, 1909. If he had the authority to make, he had the authority to unmake. If he could amend or modify the statute in one case he could do so in the other."

As this is one of a large number of companion cases which have been pending in various forms before the Interior Department and the Federal and State Courts for the past ten years, it is earnestly submitted that these differences of opinion between the United States and the California courts should be ironed out, and hence that this Honorable Court should take jurisdiction in the present instance.

II.

The opinion of Judge Morrow is not only directly at issue with that of the highest court of the State of California, but is, we submit, eminently correct.

The act of May 4, 1880, *supra*, provides in express terms that the successful contestant against any pre-emption, homestead or timber-culture entry "shall be notified by the Register of the land office * * * of such cancellation, and shall be allowed *thirty days from date of such notice* to enter said land."

In the present instance respondent Fleischer was notified by the Register and Receiver of the cancellation of the Rider entry on February 11, 1909 (Record, p. 17), but he never tendered his homestead application until May 18, 1910, or one year, three months and one week later. This is certainly not the "thirty days" mentioned by the statute.

The above-quoted provision of the act of 1880 has never been repealed or modified by law, and we submit that it

could not be by ukase of the Interior Department. The general provision in the Reclamation Act authorizing the Secretary of the Interior to make rules and regulations to carry it into effect should certainly not be construed as a repeal of a provision of a previous act of Congress passed on a different subject, and to so construe the later act would go contrary to all of the rules of statutory construction, particularly the rule that a repeal of a statute by implication is not favored (Potter's Dwarris on Statutes, 156; Sedgwick on Statutory Construction, 98; McCool vs. Smith, 1 Black, 470; "The Distilled Spirits," 11 Wallace, 356; State vs. Stoll, 17 Wallace, 430).

To quote from the Department itself, namely, from a well considered decision of Secretary Hitchcock (Edwin J. Miller, 35 L. D., 411), which cited and followed numerous decisions of this court:

> "Where a complete system has been adopted for the disposal of lands of a particular character, it will not be presumed that Congress intended by subsequent legislation to supersede such system and to dispose of those lands in a different manner, unless such purpose is clearly expressed or indicated, or unless the two statutes are irreconcilable."

III.

Finally, we urge that the Departmental Regulations of January 19, 1909, quoted above, should be given effect by the courts even if the Interior Department has seen fit to repudiate them. They were issued three weeks before the Rider entry was noted canceled on the local office records and more than a year prior to John McLaren's settlement on the land. During all of that time they were in full force and effect, the petitioner's decedent and settler relied upon them and he had every right to so rely. He has

waged a ten-year fight to bring about their enforcement and so have the other settlers in the companion cases, some of whom even suffered criminal prosecution and imprisonment in an effort to maintain their rights (Edwards and Culpepper vs. United States, 223 Fed. Rep., 309).

The law deals tenderly with the rights of a settler on the public lands (Ard vs. Brandon, 156 U. S., 537, 543; Tarpey vs. Madsen, 178 U. S., 215, 221).

> "It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." (Lytle vs. Arkansas, 9 Howard, 314.)

Accordingly, we respectfully urge that not only the law but the equities are with the petitioner here, his decedent being both the prior applicant and the prior settler while his adversary relies upon a mere paper right, which was in conflict with a positive act of Congress and had been declared nonexistent by regulations of the Department of the Government charged with the administration of the public domain.

Accordingly, we submit that the petition for certiorari should be allowed and the record reviewed by this court.

Respectfully submitted,

SAMUEL HERRICK,

HENRY M. WILLIS,

Attorneys for Petitioner.

EXHIBIT A.

OCTOBER.

Filed, Dec. 1, 1919, B. Grant Taylor, Clerk. By Erb. Deputy.

DEPARTMENT ONE.

ARCHIE J. McLAREN, ADMINISTRATOR OF JOHN McLAREN, DECEASED, *Plaintiff and Appellant,*

vs.

L. G. FLEISCHER, *Defendant and Respondent.*

This appeal was taken from a judgment of the Superior Court of Riverside County dismissing plaintiff's complaint after a general demurrer was sustained and the plaintiff refused to amend.

The action was brought by the plaintiff against the defendant to procure a decree in equity declaring that the defendant holds the title to a certain quarter section of land in trust for the plaintiff, requiring the defendant to convey title to the plaintiff, and for the value of the use of the land for the period set forth in the complaint. The prayer of the complaint is based on allegations to the

effect that the plaintiff was wrongfully, through mistake of law, deprived of such title, or the acquiring of such title, and the defendant was wrongfully, and by mistake of law, granted such title by the land department of the United States. There is no claim of fraud, either actual or constructive.

Before proceeding to a consideration of the points involved in this appeal it is proper to point out that the rule is well settled that the courts cannot exercise direct jurisdiction over the rulings of the officers of the land department of the United States, nor are the courts authorized to reverse or correct such rulings in collateral proceedings between private parties, but that the decisions of the land department are subject to review by the courts only where it appears that the land department has committed an error of law and denied to the parties the rights to which they are entitled under the constitution and the laws of the United States. Under such circumstances the courts can in a proper proceeding, interfere and refuse to give effect to the action of the land department. In Quimby vs. Conlan (104 U. S., 420) it was said: "It would lead to endless litigation, and be fruitful of evil if a supervisory power were vested in the courts over the actions of the numerous officers of the land department, or mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights, which upon a correct construction, would have been conceded to them, or when misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and

the matter should be deemed settled." (Citing cases.) In Gage vs. Gunther (136 Cal. 338) this court declared: "If, however, in making such determination of fact, that tribunal (the land department of the United States) has disregarded the law applicable thereto, or has erred in its construction of the law or by reason of mistake has issued to one person a patent for the land, which upon undisputed facts should have been issued to another who has contested his claim and has shown himself entitled to the patent, the person in whose favor the patent was issued will be held to hold the land for the benefit of the one to whom it should have been issued. Proceedings for this purpose are, however, to be taken in a court of equity, and are to be governed by the rules of equity procedure."

The following facts are taken from the complaint and must stand as true: On February 9, 1903, the southeast quarter of section 12, T. 7S., R. 22E., S.B.M., in the Palo Verde Valley, Riverside County, was open to public entry under the land laws of the United States, and on that day one Charles W. Rider made his homestead entry on said land by filing his application in the land office at Los Angeles. This quarter section, along with other lands, was withdrawn from all forms of entry on September 8, 1903, by order of the land department, under and by virtue of the Act of Congress, approved June 17, 1902, and known as the Reclamation Act (32) Stats. 388), such withdrawal being what is commonly known as "first form withdrawals," during the existence of which no lands embraced therein can be entered, selected or located in any manner.

On February 18, 1908, while these lands were still withdrawn from public entry, L. G. Fleischer, defendant and respondent herein, filed a contest of the Rider entry before the register and receiver of the local land office at Los

Angeles, who sustained the contest and recommended to the Commissioner of the General Land Office that the Rider entry be cancelled. The Commissioner approved the recommendation and on January 26, 1909, cancelled the entry, and directed the register and receiver to advise all parties in interest. The defendant was notified by by the register and receiver, of the cancellation of the entry, on February 11, 1909, and at the same time was notified by the register and receiver that he had been awarded a preference right to enter upon the said quarter section *within thirty days after the said land had been restored to public entry.* An order of the Secretary of the Interior, dated January 10, 1910, restored the quarter section, along with other lands, to public settlement on April 18, 1910, and to public entry on May 18, 1910.

On the day that the land was restored to public settlement, April 18, 1910, the plaintiff, "being in all ways qualified under the laws to do so," made actual settlement on the quarter section hereinbefore mentioned, with the intention of claiming the land under the homestead laws of the United States. And on May 18, 1910, he filed his homestead application, as such settler, in the local land office at Los Angeles, paid the fees required by law, continued thereafter to reside upon and improve the land, and "in fact complied with all the laws, and requirements of the laws of the United States, and all the rules and regulations of the Land Department of the United States, relating to homesteads, except as prevented or prohibited by the officers of said Land Department, until he was ejected from said premises by judgment of the Superior Court of the State of California, in and for the County of Riverside, entered April 24, 1915."

The defendant, on May 18, 1910, made his application for entry on the same quarter section, but subsequent to

the application of the plaintiff, claiming a preference right to make such entry, under and by virtue of the preference right awarded him by the provisions of the act of May 14, 1880, hereinafter set forth. On the same day all the entries on this quarter section and certain other land were suspended, pending the settlement of a contest between the State of California and the United States as to the character and disposition of these lands. On May 22, 1912, the lands were again restored to public entry, subject to the applications already made. Some time later, namely, on June 3, 1912, the register and receiver of the local land office at Los Angeles rejected the application of the plaintiff and allowed that of the defendant, "on the sole ground that the said defendant had acquired a preference right * * * by reason of the successful termination" of his contest of the Rider entry. Plaintiff appealed, but the Commissioner of the Land Office affirmed the decision of the register and receiver. In pursuance of this decision a patent for the said quarter section was issued to the defendant on January 15, 1915.

From the date of his settlement on the land April 18, 1910, until he was ejected under the judgment of the superior court above mentioned, the plaintiff lived on the land with his family and the complaint alleges that he has been always qualified, under the laws of the United States, to make the proposed homestead entry and has complied with all the requirements of said laws and all the rules and regulations of the Land Department of the United States relating to homesteads, except as prevented or prohibited by the officers of the Land Department.

The point is raised in the brief of *Amici curiae* that the "plaintiff has not connected himself with the government or shown that he is vested with the equitable title so

as to enable him to maintain this action." There is clearly no merit in this contention. Section 2290 of the Revised Statutes of the United States provides:

"That any person applying to enter land * * * shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, * * * except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified." What constitutes an entry was laid down in Hastings, etc., Co. vs. Whitney, 132 U. S., 357, 33 L. ed., 363, Mr. Justice Lamar writing the opinion:

"Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered." (See also, Whittaker vs. Pendola, 78 Cal., 296; Northern Pac. R. Co. vs. Nelson, 22 Wash., 521.)

The case of Chapman vs. Quinn (56 Cal., 266) is relied on to support the contention that the plaintiff has not connected himself with the government title sufficiently to entitle him to maintain the present action to declare the defendant trustee of the title for his benefit. This decision,

however, is not in point. In that case the court was considering the pre-emption statute, which provided that before an entry could be made under that section it must be established to the satisfaction of the register and receiver that the applicant had settled upon and improved the land he sought to enter (p. 274). Section 2290, it will be observed, does not require the applicant to do anything more than the plaintiff herein had done in order to enter the land; that is to say, to make, subscribe and file in the proper land office the affidavit required by that section, and to pay the amount of money necessary to enter the quantity of land he applies for. When this is done his right is complete. The statement in the opinion of Mr. Justice Lamar which seems to imply that the entry is not complete until the officials execute a certificate of entry to him is not warranted by the statute. The applicant has put himself in privity with the government when he has done all he could do in the matter. He is then in a position to compel the officials to do their duty toward him and to assert his right against others claiming a similar right from the government. The plaintiff in this case had complied in all respects with the law and stood in the relation of an entryman upon a homestead claim. In Chapman vs. Quinn, under a lawful rule of the Land Department, Quinn had not been allowed to file any application or make any proof. The two cases are clearly distinct and different.

The only question presented and decided in the Land Department was whether the plaintiff or the defendant had the better or prior right to enter the land. This question was decided in favor of the defendant on the single ground that he had been granted a preference right. The sole question, therefore, which is presented for decision here is whether the officers of the Land Department made a mistake of law in granting the defendant a preference

right, in the recognition of which it became necessary to cancel plaintiff's entry.

A preference right is authorized by the Act of Congress of May 14, 1880 (21 Stats., 140) which reads in part as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber cultiure entry, he shall be notified by the register and receiver of the land office of the district in which such land is situated of such cancellation and *shall be allowed* thirty days from date of such notice to enter said lands."

At the time this act of 1880 was passed the Reclamation Act had not been enacted. It is obvious that the act of 1880 is based on the assumption that when the entry of one claimant was cancelled the successful party could immediately enter the land. It contemplates land which would remain subject to entry during the contest. The provision that the successful claimant should be allowed thirty days within which to enter the land after he was notified by the land office of the cancellation of his adversary's entry, was intended and supposed to give him thirty days, during the whole of which time he could complete his own entry. It cannot be conceived that the Congress intended to start the time of his preference running before it was possible for him to exercise his right thereto. The law gives the preferred right absolutely and the provisions regarding the giving of notice of necessity imply that the land shall be subject to entry at the time the notice is received and that it must be subject to entry before the notice can become effective to start the time running. The notice which the act contemplates shall be given must be understood to be a notice which would give effect to the right intended to be preserved, and not a notice that would

defeat it. In this case the land was not subject to entry at the time the contest was terminated and Rider's entry canceled. The register and receiver apparently so interpreted the effect of the act of 1880 when they sent the notice, for it informed the defendant that his preference right to enter the land would continue for thirty days after the land was restored to entry. The notice they gave must be construed as a notice to take effect on the restoration to entry of lands involved and not before. If this construction is not given, the object of the act of 1880 would be utterly defeated in all cases such as the one at bar. The land department itself has so understood and construed the act. Section 10 of the Reclamation Act gives to the secretary of the interior, authority to make such rules and regulations as may be necessary and proper to carry its provisions into effect. These provisions include his order restoring the land to entry after its withdrawal. As evidence of the departmental construction of the act of 1880, certain regulations were promulgated on June 6, 1905, of which number 7 provides that "any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from the notice that the lands involved have been *released* from such withdrawal and made subject to entry." The land department with regard to lands so withdrawn, has consistently held to the proposition that the preference right to enter given to the successful contestant by the act of 1880 does not begin to run until the land is again restored to entry, regardless of the time when he received the official notice of cancellation of his adversary's entry. The construction placed upon an act of Congress by the land department, with respect to the disposition of public lands, and its practical application thereof, is always given great weight by the courts in construing the law and is followed if it is at

all reasonable. We are satisfied that the land department correctly construed the act in the present case in its decision that the time within which the defendant could exercise his preference right, after the cancellation of the other entry, did not begin to run against him until the time of the restoration of the land to public entry. This occurred on May 18, 1910. This was in effect decided by the land department in the case of Fairchild vs. Eby, 37 L.D., 362. Referring to the department regulations aforesaid and to the preference right allowed by the act of 1880 the secretary of the interior there said: "It was thus contemplated that the preference right allowed by the sixth section (of the regulations) should remain suspended if the land was not subject to entry at the date of cancellation, but that the preference right so acquired might be exercised whenever the land was restored." The sixth section refers to the preference right accruing under the act of 1880 aforesaid. To the same effect see Wright vs. Francis, 36 L.D., 499; Beach vs. Hansen, 40 L.D., 607; Wells vs. Bodkin, 22 L.D., 340; Edwards vs. Bodkin, 42 L.D., 172.

Appellant relies upon Edwards vs. Bodkin, 249 Fed. 562, in support of his claim that the preferred right was awarded to the respondent through mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the preference right. It was there held that the commissioner of the general land office had mistaken the law in declaring that the settler had abandoned his homestead claim. In discussing the question the court remarked that the Reclamation Act did not confer authority "upon the secretary of the interior to so extend the limitation of the act of May 14, 1880." This is the statement relied upon. It is unnecessary to determine in this case whether the reclamation act gave or could give legislative authority to the secretary of the interior or not.

It is enough for the purpose of this act to say that he may construe the act of 1880 in connection with the Reclamation Act, and if the construction he adopts is reasonable it will be upheld and followed by the courts.

For these reasons we are of the opinion that the preferred right of the defendant to complete his entry and thereupon occupy the land for the purpose of acquiring a homestead patent did not begin to run until the time of the restoration of the land to entry, when for the first time it became possible for him to exercise the right given by the statute. The demurrer was properly sustained.

The judgment is affirmed.

LAWLOR, J.

We concur:

SHAW, J.

OLNEY, J.

FILED
MAR 28 1921
JAMES D. MAHE
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Nos. 291 and 292

IN THE

Supreme Court of the United States

October Term 1920

No. 291

ARCHIE J. McLAREN,
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On Writ of Certiorari to The Supreme Court of The State of California.

No. 292

ROBERT L. CULPEPPER, *Petitioner*
v.
JAMES M. OCHELTREE

On Writ of Certiorari to The Supreme Court of The State of California.

MOTION TO ADVANCE.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Writ of Certiorari to The Supreme Court of The State of California.

MOTION TO ADVANCE.

Comes now the respondents in Nos. 291 and 292, by their counsel of record, and respectfully move the Court to advance the above entitled cases to be heard at the earliest date in the present term as may be consistent with the convenience of the court and immediately following the argument in

No. 495, in event the Court grants the petition for rehearing which has been filed in the last numbered case.

REASONS FOR ADVANCING.

These two cases (Nos. 291 and 292) are before this court on certiorari to the Supreme Court of the State of California. They involve precisely the same questions which, as we very respectfully but earnestly and sincerely submit, were *duly* presented in No. 495, Bodkin vs. Edwards, an appeal to this court from the Circuit of Appeals for the Ninth Circuit.

None of the several legal questions of far reaching importance which were presented in the assignment of errors in No. 485 was determined in the opinion this court expressed in that case on February 28, 1921, in an affirmance of the decree of the said Circuit Court of Appeals. In passing it may be appropriate to remark that the affirmance in that case was made on a motion to dismiss or affirm, to which motion no answer was made by the appellant because of the conviction of his counsel that said motion conspicuously failed to set out or even allude to a single valid reason for a dismissal or an affirmance. Said counsel now truly regrets that he advised the withholding of an answer, for he is morally certain that if an answer had been made this Court's attention would necessarily have been directed to matters precluding the possibility of such an announcement by it as was made in its opinion, to wit: that "the case as presented here turns essentially on questions of fact." This stated reason for the affirmance was not even remotely suggested in the motion to dismiss or affirm.

In a motion for rehearsing in No. 495, which has recently been filed, we have clearly shown, as we profoundly believe, that the decisions of the district and appellate courts in that case necessarily turn essentially and entirely on ques-

tion of law—that matters of fact were neither relied upon by either party to the litigation nor ever urged upon any of the lower courts—*and that all the questions of law in the said case are identical with all the question of law which are presented in Nos. 291 and 292.* It is due to these considerations that we have suggested to the court in this motion that it make order for argument in Nos. 291, 292 and 495, in event the petition for rehearsing in the latter is entertained, at approximately the same time.

The affirmance in No. 495 remarks that the record therein "does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included." We very respectfully submit that upon consideration of the petition for rehearing in No. 495, this court will apprehend that no cause exists for suggestion from any source of a diminution of the record. Each party to the cause was entirely free to designate any parts of the record printed which he deemed essential to presentation to this court of what he conceived to be the true and only issues in the proceeding. As a matter of record fact it is evident from the designations for printing which both parties to the controversy filed that *they both realized that the only questions that could possibly be presented to this court were questions of law exclusively.*

It is true that the appellee designated for printing certain testimony *given in the District Court* by the appellee, Edwards, and one McFee. This testimony is set out at pages 65 to 71 of the record. Perusal thereof will be convincing of the fact that it was taken in a futile attempt to have the courts below find error in the decisions of the Department of the Interior in the contest proceedings with respect to matters of fact. Re-perusal of all of the decisions of the courts below in No. 495 will be convincing that none of those

courts rested any of their decisins upon findings of fact. *Such perusal will be convincing that in everyone of those decisions the determinative matter was a matter of law exclusively, to wit, whether any of the allegations of the bill of complaint were material, the Court of Appeals, alone, adjudging the materiality thereof and the District Court under the "law of the case" doctrine being constrained to accept the Appellate Courts views on materiality.* We beg leave to add in this connection that with the exception of this testimony from the appellee, Edwards, and the said McFee, the record in No. 495 contains no testimony or evidence other than that which we shall refer to as documentary, because consisting of notations on the records in the United States Land Office at Los Angeles, California (R. 30 to 37; 48 to 49; 54 to 56), papers in appellant's contest in the land department against appellee's homestead entry (R. 34 to 36), the appellee's alleged final proof which he submitted subsequent to the hearing on the contest and a decision by the Register and Receiver therein adverse to him (R. 44 to 48 for such proof and 37 for such decision), and *eight decisions of officers of the Land Department*, all adverse to appellee which were rendered in the period from December 31, 1908 to April 6, 1915.

The comments in the two foregoing paragraphs are made by us in the hope that this Court may find it possible to be in agreement with us that the identity of the legal questions in Nos. 291, 292 and 495 is not in any wise affected by the fact that a scant amount of inadmissible and incompetent testimony was taken *from the witness chair in the District Court* in No. 495, while in Nos. 291 and 292 the cases were heard and determined on demurrers to the complaints.

In No. 495 the Circuit of Appeals, 249 Fed. 562, 567, committed the very serious error of holding that the 5th Section of the Act of June 27, 1906, 34 Stat. 519, 520,

which expressly and exclusively relates to desert land entries, relieved from contest on a charge of abandonment every homestead entry of public lands situated within an area withdrawn under first form in aid of the purposes of the Reclamation Act of June 17, 1902, 32 Stat. 388. Said appellate court's said opinion is very plainly to the effect that cancellation by the Land Department of a homestead entry upon a proved charge of abandonment at a time when such form of withdrawal was in force operated as an unlawful and wrongful deprivation of the rights of a homestead entryman under the law of the land. Out of this egregious error arises the fallacious and mischievious legal theory that in a case such as was made by the pleadings in No. 495 the sole inquiry is as to a matter of fact, to wit, whether the person whose homestead entry was canceled upon a charge of abandonment during continuance of a first form withdrawal was in occupancy of the land in question, or had abandoned same, at the time of abatement of the first form withdrawal and restoration of the land to the public domain.

It is only upon the assumption, a strained and violent one, that the views of the Circuit Court of Appeals as to the meaning of the 5th Section of the Act of June 27, 1906, are correct, that it can be said of No. 495 that "the case as presented here turns essentially on questions of fact." Upon such assumption the material questions of fact would be whether at time of discontinuance of the first form withdrawal and restoration of the land to the public domain, regardless of all matters of fact pertaining to the land theretofore, the land was or was not indeed abandoned by the claimant thereof under the homestead entry which had been canceled theretofore. *There is no other conceivable theory for regarding No. 495 as a case which, in this court, "turns essentially on questions of fact."*

Neither in the pleadings in No. 495, nor in the evident

purpose of the evidence adduced on either side, is there anything carrying the slightest indication or intimation of an understanding by the parties or by their counsel that the case is one determinative on its merits with reference to questions of fact. With equal positiveness and certainty we assert that there is not anywhere in the language of the opinions of the district and appellate courts a single statement indicative of entertainment by those courts of a thought that any of the issues presented in the proceeding rested upon a determination of questions of fact.

Since rendition of the appellate court's opinion in No. 495, 249 Fed. 562, and because of the many and menacing errors of law commited in that opinion, notably the observation therein that "we assume that the act of June 27, 1906, was overlooked, or its meaning misunderstood when the officers of the Land Department held that the plaintiff had abandoned his homestead entry," many titles resting upon many patents issued by the Land Department during the past fifteen years have been unsettled and actually questioned by such proceedings in the courts as were instituted by the appellee in No. 495 and the petitioners for certiorari in Nos. 291 and 292. *If it be true that he said act "was overlooked, or its meaning misunderstood' by the Land Department, it is perfectly obvious from the standponit of the public interests that his court should expressly so declare, and at an early date. On the other hand, if there be absolutely no merit in the very harsh criticism of the Land Department which is expressed in the said observations by the said appellate court, it is clearly obvious from the standpoint of the public interests that his court should expressly so declare and at an early date.*

At this time, and because of the wide spread notion that this court's affirmance in No. 495 is an emphatic approval of and concurrence in said appellate court's observation that

the said act of 1906 "was overlooked, or its meaning misunderstood" by the Land Department, numerous suits similar to numbers 495, 291 and 292, have been instituted or are in contemplation. That there has been encouragement of such suits by this court's opinion in No. 495 is due to the popular inference from said opinion that therein it was affirmatively held, in harmony with the views of the appellate court as to the meaning and effect of the 5th section of the act of June 27, 1906, supra, that the said act rendered abandonment of homestead entries during continuance of a first withdrawal permissive, rendered cancellation of such entries upon proof of abandonment during such period in contest proceedings before the Land Department ineffective and invalid and left for determination by the courts only the question of face whether the claimants under such entries had abandoned them at time of abatement of the withdrawal and restoration of the lands to the public domain.

IDENTITY OF THE QUESTIONS IN NOS. 291, 292 and 495 AND THE PROPRIETY OF CONSIDERATION OF THE PETITION FOR REHEARING IN NO. 495 IN CONJUNCTION WITH THIS MOTION TO ADVANCE

The motion to dismiss or affirm in No. 495 was presented by counsel who are the same counsel for petitioners in Nos. 291 and 292. At no place in the said motion is there the slightest reference to the pendency in this court of Nos. 291 and 292. Certainly such a reference would have apprised the court that whatever action it might take under said motion in No. 495 would possibly have an effect on its deliberations and decisions in Nos. 291 and 292. We assume that the court neither considered nor took actual notice of Nos. 291 and 292 in passing on said motion in No. 495.

The extent to which, if at all, the affirmance in 495 is decisive of any question of law in Nos. 291 and 292 is dependent entirely upon the action this court takes on the petition for rehearing in No. 495, for if that petition be denied, the denial will necessarily rest upon adherence by this court to its conclusion, heretofore announced, that No. 495 "as presented here, turns essentially on questions of fact." That announcement, as it seems to us, is without any basis in the record in No. 495, unless the basis therefor be stated as being that the Circuit Court of Appeals correctly concluded that the Act of June 27, 1906, supra, relieved homestead entries from contest during the period of continuance of a first form withdrawal and that, therefore, the only question presented was the single question of fact, to wit, whether the evidence in No. 495 showed that the appellee therein had abandoned his land at the time of abatement of the withdrawal and restoration of the land to the public domain. If that should be stated as the basis for denial of the petition for rehearing in No. 495 it would necessarily follow, we think, that the decrees of the Supreme Court of the State of California in Nos. 291 and 292 would be reversed for the reason that the demurrer to the complaint in No. 291, as well as the demurrer to the complaint in No. 292, admitted that the plaintiff in each of those cases had not abandoned the land he claimed therein at time of abatement of the withdrawal and restoration to the public domain but was at that time, at least, in occupancy thereof. (R. 10 in 291, and R. 3 in 292).

This court will not assume in either of these three cases to review the findings of fact made in the decisions of the Land Department in the contest proceeding which resulted in cancellation of the homestead entry referred to in the case, and if that be certain then, inevitably, whatever questions of fact may be inquired into and determined by the judiciary

in any case of like character must be questions of fact relative to matters arising after termination of the several contest proceedings and subsisting at time of abatement of the first form withdrawal and restoration of the land to the public domain. *Such questions or matters of fact can be material only in the event that the conclusions of law announced by the Circuit Court of Appeals in No. 495 are sound.* Up to this time this court, insofar as we have been able to determine from its decisions, has never yet passed on any of those questions.

We had hoped to have it pass on those questions in its action on our appeal in No. 495. But probably due, as we pray the liberty to suggest, to error committed in deducing from the rather involved and confused record in No. 495 the true character of the issues therein, an error to which counsel for appellant might have contributed by withholding from the Court whatever assistance an answer by him to the motion to dismiss or affirm would have afforded, we are constrained by duty to our client and not less to the court to seek a decision in accordance with the true issues in No. 495 under a petition for rehearing in that case.

A comparative study of Nos. 291, 292 and 495 discloses the wide divergence of opinion between the Supreme Court of the State of California as set out in the opinions in Nos. 291 and 292 and the opinion of the Circuit Court of Appeals for the Ninth Circuit as set out in No. 495. All of the questions of law in Nos. 291 and 292 were decided by the said court in accordance with views thereon *which are consistent with the uniform rulings of the Land Department* and which are the antithesis of the views expressed on the very same questions of law by the Federal district and appellate courts in No. 495. *It was undoubtedly this wide divergence of views on precisely the same questions of law that persuaded and induced this court to grant the writs of certiorari to the state court in Nos. 291 and 292.*

In the petitions for certiorari in Nos. 291 and 292, four district grounds or reasons for allowance of the writ were set out, the first of them being that the opinions of the state court to the effect "that the respondent could and did secure a preference right to the land in controversy under the act of May 14, 1880 (21 Sta. 141), which right took effect after said land had been restored from the Reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards vs. Bodkin, 249 Fed. 562, 568." *Edwards vs. Bodkin is No. 495 in this Court and presents the identical questions of law referred to in the first of the stated grounds or reasons for certiorari in No. 291 and 292. See the second of the errors assigned on the appeal to this court in No. 495.* (R. 88 in *No. 495*).

The second of the stated grounds for certiorari in No. 291 and 292 is that the Secretary of the Interior is without authority of law to provide by regulation or otherwise that a contestant may exercise his preference right of entry "thirty days after the land shall have been restored from the reclamation withdrawal under which it was at the time of the contest or at the time of the cancellation" of the entry contested. The State court held in Nos. 291 and 292 that the Secretary possessed due authority to make such administrative regulations. The Circuit Court of Appeals held in No. 495 that the Secretary was without such authority. *The second and third of the errors assigned in No. 495 (R. 88) challenge the correctness of that holding by said court. If Nos. 291 and 292 are rightly here on certain questions of law, it is impossible, we think, for No. 495 to be here otherwise than upon the same questions.*

The third of the stated grounds for certiorari in Nos. 291 and 292 is that the regulations of the Land Department of January 19, 1909, 37 L. D. 365, terminated, ipso facto, all the rights of a successful contestant. The State Court in

Nos. 291 and 292 rejected that contention but the Federal Court in No. 495 sustained it. *The third of the specifications in the assignment in No. 495 (R. 88) alleges error on the part of the Federal Court in sustaining said contention. The identity of the questions in Nos. 291, 292 and 495 seems to us to be beyond all doubt.*

The fourth, and last, of the stated grounds for certiorari in Nos. 291 and 292 is that the decedent of the petitioner for certiorari was an actual settler at time of revocation of the withdrawal and therefore was entitled to entry as against one "who relied entirely upon the alleged preference right aforementioned." The State Court in Nos. 291 and 292 rejected that contention but the Federal Court in No. 495 sustained it. *The fourth, fifth and sixth of the errors assigned in No. 495 (R. 88) challenge the correctness of the Federal Court's action. We respectfully submit that it cannot be successfully contradicted that the questions in the said three cases are identical and are questions of law purely.*

If this Court did not conclude, in agreement with the Circuit Court of Appeals, that the said Act of 1906 rendered abandonment of reclamation homesteads permissive during the period they were affected by a withdrawal under the reclamation act, and that, therefore, the question before the trial court and in the upper court was necessarily only one of fact, to wit, was Edwards in occupancy of the land after discontinuance of the withdrawal and at time of restoration, we say, with the utmost respect and sincerity, that it is inexplicable to us how this court could have concluded on the record before it that "the case as presented here turns essentially on questions of fact."

We take the liberty of remarking that the Supreme Court of California in Nos. 291 and 292 found it impossible to follow and adopt the reasoning of the Circuit Court of Appeals as to the meaning of the said act of 1906. The State Court rejected the Federal Court's construction of

that statute as completely as it rejected the Federal Court's views that the regulations of the Department of the Interior of 1905 were invalid. A word as to those regulations, for it is around them that all the controversy has ever revolved.

The dominant questions in Nos. 291, 292 as well as in No. 495, are these:

First, Had the Secretary of the Interior the authority, with respect to public lands which have been withdrawn in aid of the purpose of the Reclamation Act of June 17, 1902 (32 Stat. 388) to prescribe regulations (6th and 7th paragraphs of the Instructions of June 6, 1905 (33 L.D., 607, at 608 and 609) as to the preference right of entry of a successful contestant under the act of Congress of May 14, 1880 (21 Stat. 140), which provide that "when an entry for lands embraced within a withdrawal under the first form is canceled by reason of contest" * * * "any contestant who gains a preference right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

As to the foregoing question the Circuit Court of Appeals, in its first decision in No. 495, 249 Fed. 562, at 568, see also the eighth paragraph of the syllabus, held that the said regulations were tantamount *to an amendment*, a modification or change of the act of May 14, 1880, supra, and therefore were invalid. This view was adhered to as the "law of the case" in the second opinion of said court in No. 495 (R. 85). In discussing the same regulations the Supreme Court of California in Nos. 291 and 292 expressly upheld them as lawful and reasonable (R. 25, in No. 291).

Second, Did the regulations of the Land Department of January 19, 1909 (37 L. D., 365) nullify a preference right of entry acquired as the fruit of a successful contest against a homestead entry under the terms of the provisions of the regulations of the said department of June 6, 1905?

As to the foregoing question the Circuit Court of Appeals, in its first decision in No. 495, 249 Fed. 562 at 569, said that "we are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909." As to the same question the State Court very properly cited and followed the decisions of the Land Department to the effect that the regulations of 1909 did not operate to work such a forfeiture of an earned and accrued statutory right (R. 25 in No. 291).

OUR APOLOGY FOR PROLIXITY

Patience on the part of the judiciary, a virtue essential to the administration of justice, has been trespassed upon here. There is, we hope, something extenuating in the fact that what appears herein, although not offered without a selfish motive, has been advanced in a cause making for early vindication in an opinion of this Court of certain long established and uniformly observed regulations and decisions of the Land Department, with resultant security and protection to many citizens who have taken title under patents to public lands which have issued in consonance with such regulations and decisions. Notice hereof has been served on petitioners' counsel in Nos. 291 and 292 and appellee's counsel in No. 495.

Respectfully submitted,

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Counsel for respondents in Nos. 291 and 292 and for appellee in No. 495.

Washington, D. C., March 24, 1921,
Service of copy hereof on me is hereby acknowledged.
SAMUEL HERRICK,
Counsel for Petitioners in Nos. 291 and 292.